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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No .....

In the Matter of

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Debtor.

Penn Central Company,

Cross-Petitioner.

Manufacturers Hanover Trust Company, as Trustee, *et al.*,

Respondents.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT BEFORE JUDGMENT

Cross-petitioner, Penn Central Company, does not oppose the granting of the three petitions, filed in Nos. 914, 916 and 920 on December 5, 1969 by representatives of the bondholders of the New York, New Haven and Hartford Railroad Company (hereinafter the "bondholders" and the "New-Haven", respectively), for a writ of certiorari to be issued to the United States Court of Appeals for the Second Circuit before judgment in that court, to review the issues raised by the orders of the United States District Court for the District of Connecticut ("Reorganization Court"). However, Penn Central respectfully prays that, if this Court grants said petitions, its review be extended to include the issues pending in the United States Court of Appeals for the Second Circuit upon the appeals of Penn Central from the orders of the Reorganization Court. These

are issues as to which the bondholders are not aggrieved by the Reorganization Court decision. The same issues are raised (in different form) by the New Haven bondholders in their jurisdictional statements in their direct appeals from the Three-Judge United States District Court for the Southern District of New York ("Three-Judge Court") —Nos. 915, 917 and 921.

Opinions Below

The opinion of the Reorganization Court, dated May 28, 1969, is reported at 304 F. Supp. 793 (D. Conn. 1968). It is printed in the Appendix entitled "The New Haven Railroad Terms of Sale and Inclusion Cases" (hereinafter the "Appendix of Decisions") which was filed with the bondholders' petitions [pp. 277-306a].

The opinion of the Three-Judge Court dated June 18, 1969, which deals with the same issues and reaches results with respect thereto in conflict with the above decision of the Reorganization Court, has not yet been reported but is printed in the Appendix of Decisions [pp. 400-443a].

The Fourth Supplemental Report of the Interstate Commerce Commission (hereinafter the "Commission"), reviewed by the two courts, is reported at 334 I.C.C. 25 (1968) and printed in the Appendix of Decisions [pp. 112-217a]. The Commission's Fifth Supplemental Report, issued in response to the above decision of the Three-Judge Court, is reported at 334 I.C.C. 528 (1969) and printed in the Appendix of Decisions [pp. 222-226a].

Jurisdiction

The Reorganization Court decree, dated July 28, 1969 [pp. 316-322a], was entered on the same day. Penn Cen-

tral timely filed a notice of appeal therefrom to the Court of Appeals for the Second Circuit on August 26, 1969.

Other orders of the Reorganization Court relating to the same issues, dated August 12 and December 24, 1968 and filed August 13 and December 24, 1968, respectively, were appealed by Penn Central in notices of appeal filed September 23, 1968 and January 23, 1969. Those appeals have been consolidated, by order of the Court of Appeals dated October 7, 1969, with the appeals from the July 28, 1969 decree of the Reorganization Court.

The record relating to the consolidated appeals was docketed in the Court of Appeals on December 1, 1969, within the time for docketing as extended by that Court. No briefs were filed with, and no argument was heard by, the Court of Appeals concerning these appeals.

The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1) and 2101(e) and Rule 20 of the Rules of this Court.

This cross-petition is being filed to insure that, in the event this Court grants the bondholders' petitions for certiorari before judgment, the review will encompass the issues which the Reorganization Court, contrary to the Three-Judge Court, resolved favorably to the bondholders. The following authorities support this procedure: *LeTulle* v. *Scofield*, 308 U.S. 415, 421-22 (1940); *Stellos Co.* v. *Hosiery Motor-Mend Corp.*, 295 U.S. 237, 239 (1935).

Questions Presented

1. Did the Reorganization Court improperly assume the valuation function assigned to the Commission by Section 77(e) of the Bankruptcy Act and disregard established standards of judicial review by substituting its own views

for the Commission's determinations with respect to the following issues:

(a) Whether, in determining a realistic liquidation value for the New Haven Railroad, recognition should be given to the economic consequences of the time required for abandonment proceedings before the Commission and the courts;

(b) Whether, in determining such a liquidation value, recognition should be given in economic terms to the risks that would be incurred by the New Haven in undertaking a retail marketing program for its properties;

(c) What valuation should be placed on the New Haven's freight yards in the Bronx; and

(d) The calculation of the discount of liquidation proceeds to present worth.

2. Did the Reorganization Court err in concluding that constitutional and statutory barriers exist to the Commission's method of determining the liquidation value of the New Haven Railroad?

3. Did the Reorganization Court improperly conclude, to the extent that its decree differs from that of the Three-Judge Court, that the Commission's valuation of the New Haven was not in accordance with legal standards and not supported by substantial evidence?

Statutes Involved

The following United States Statutes are involved in this case and are printed in the Appendix of Decisions [pp. 453-465a]:

Sections 77(b), 77(d) and 77(e) of the Bankruptcy Act, 11 U.S.C. §§ 205(b), 205(d) and 205(e); and

Sections 1(18), 1(20) and 5(2) of the Interstate Commerce Act, 49 U.S.C. §§ 1(18), 1(20) and 5(2).

Statement

This Court is aware that the Penn Central merger was conditioned, under Section 5(2)(d) of the Interstate Commerce Act, 49 U.S.C. § 5(2)(d), upon inclusion of the New Haven in the merged line. Such inclusion was to be "upon such fair and equitable terms as the parties may agree subject to the approval of the Bankruptcy Court and the Commission." 327 I.C.C. 475 at 553.

Following more than five months of evidentiary hearings, the Commission concluded in its Second Supplemental Report and Order, dated November 16, 1967,* that a price fixed by agreement between the New Haven Trustees in Bankruptcy and representatives of the Pennsylvania and New York Central railroads, after almost two years of negotiations, was a fair price under both the Interstate Commerce and Bankruptcy Acts. This determination was reviewed concurrently by the Three-Judge Court and the Reorganization Court. Both courts vacated the Commission's determination, on the ground that the Commission had erroneously concluded that the agreed-upon consideration was at least equivalent to the liquidation value of the New Haven, and remanded the case to the Commission.**

The Reorganization Court's order of remand was appealed by Penn Central, and the appeal has been con-

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* The Report, which can be found at 331 I.C.C. 643, and the unreported Order are set forth in the Appendix of Decisions [pp. 1-111a, 466-469a].

** The Three-Judge opinion is reported at 289 F. Supp. 418 (S. D. N. Y. 1968) and the Reorganization Court opinion at 289 F. Supp. 451 (D. Conn. 1968). Both are printed in the Appendix of Decisions [pp. 323-383a, 237-260a].

solidated with its appeals from other Reorganization Court orders.

After remand hearings* and briefing, the Commission in its Fourth Supplemental Report and Order** reassessed the realistic liquidation value of the New Haven and concluded that the purchase consideration to be paid by Penn Central should be increased over the agreed-upon consideration by over $20 million to $145.6 million (including $5 million of loss sharing). Responding to a threatened shutdown of the New Haven operations by the Reorganization Court on January 1, 1969, see 289 F. Supp. 451 at 458-59, the Commission also ordered Penn Central to take over the New Haven's operations no later than that date and concurrently to pay the increased purchase price.

Penn Central attempted to obtain review of the Commission's price determination by the Reorganization Court in advance of the January 1 take-over date, but that Court declined to undertake such prior review by an order dated December 24, 1968.*** This order of the Reorganization Court was appealed by Penn Central. Penn Central sought a stay of the Commission's take-over order in the Three-Judge Court, asserting that Reorganization Court approval of the price was a necessary condition precedent

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* The remand hearings commenced on October 7, 1968 and were concluded on October 15, 1968. Forty documentary exhibits were received in evidence and the transcripts and exhibits of nine days of hearings before a Special Master appointed by the Reorganization Court were also received in evidence.

** The Report and Order can be found at 334 I.C.C. 25 and are set forth in the Appendix of Decisions [pp. 112-220a].

*** The Reorganization Court's order and accompanying opinion are not reported but are set forth in the Appendix of Decisions [pp. 263-276a].

to the transfer of the assets. The stay was denied.* The Three-Judge Court noted that the "thorough and conscientious effort by the Commission" in its Fourth Supplemental Report had seemingly narrowed the range of "true controversy" over the price. Appendix of Decisions [pp. 392-393a].

Subsequent to the December 31, 1968 take-over, the Reorganization Court and the Three-Judge Court again concurrently reviewed the Commission's price determination. The Three-Judge Court sustained the Commission's Fourth Supplemental Report with modifications which had the effect of again increasing the purchase consideration payable by Penn Central—this time by $4.37 million, to a total of approximately $150 million (including loss sharing). Appendix of Decisions [pp. 400-443a].** The Reorganization Court, however, took issue with the Commission's findings as to the New Haven's liquidation value and, applying the Court's own views as to the liquidation value of the New Haven, increased the purchase price by approximately $28 million over and above the price as adjusted by the Three-Judge Court. 304 F. Supp. 793; Appendix of Decisions [pp. 277-306a].

The conflict between the opinions of the Three-Judge Court and the Commission, on the one hand, and the opinion of the Reorganization Court, on the other, is attributable to the following:

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* This denial was in the form of an oral opinion which is not reported, but the transcript of the opinion is set forth in the Appendix of Decisions [pp. 387-393a].

** The Commission, in its Fifth Supplemental Report, as modified, and Order, brought its decision into conformity with the Three-Judge Court opinion. The Report and Order are reported at 334 I.C.C. 528 and are printed in the Appendix of Decisions [pp. 222-228a]. Penn Central took no appeal from the Three-Judge Court decree.

	Further Price Increase Sought to be Imposed on Penn Central by the Reorganization Court
1. Refusal of the Reorganization Court to permit the Commission (in its valuation of the New Haven assets upon a liquidation assumption) to take account of the economic consequences of the delay inherent in the statutorily-mandated abandonment proceedings	$15,386,000
2. Refusal of the Reorganization Court to accept the Commission's recognition, in dollar terms as supported by expert testimony, of the risks inherent in conducting a long-term retail marketing program for the New Haven land	6,695,000
3. Substitution by the Reorganization Court of its own valuation of the New Haven's freight yards in the Bronx of New York for the Commission's valuation	4,439,000
4. Substitution by the Reorganization Court, upon settlement of its decree, of the bondholders' recalculation of the discount of liquidation proceeds to present worth for the Commission's determination of such discount based on the testimony of the expert witness who supervised the liquidation study for the New Haven Trustees	2,005,899

Reasons for Granting the Cross-Petition

The Three-Judge Court's disagreement with the rulings of the Reorganization Court with respect to the four matters listed above is the principal grievance raised in the jurisdictional statements of the bondholders in Nos. 915, 917 and 921. The instant cross-petition is designed solely to assure that, if the bondholders' petitions for certiorari in Nos. 914, 916 and 920 are granted, the same four issues will be pending before this Court in its review of the Reorganization Court decision. This cross-petition does not relate to any of the several issues raised by the bond-

holders in their jurisdictional statements and in their petitions for certiorari as to which both lower courts were in agreement.

Briefly, Penn Central's position with respect to the issues sought herein to be reviewed is that the Reorganization Court failed to accept the statutory mandate of Section 77(e) of the Bankruptcy Act, 11 U.S.C. § 205(e), which commits the function of valuation to the judgment of the Commission, and also disregarded the holdings of this Court that on judicial review the Commission's valuation findings must be accepted if they are supported by substantial evidence and consistent with applicable legal standards.

Penn Central contends that the Reorganization Court substituted its own notions as to value for the reasoned findings, based on substantial evidence, of the Commission as to the proper valuation of the New Haven assets. The issues sought herein to be reviewed are substantial—not because, as the bondholders erroneously maintain, constitutional and statutory requirements were violated by the Commission and the Three-Judge Court—but because of the Reorganization Court's usurpation of the valuation function assigned by Congress in 1935 exclusively to the Commission.* This invasion of an area reserved to the

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* The pertinent language of Section 77(e) is as follows:

"If it shall be necessary to determine the value of any property for any purpose under this section, the Commission shall determine such value and certify the same to the court. . . ." 11 U.S.C. § 205(e).

The above language was not in the original bill submitted to Congress in 1935 by the Federal Coordinator of Transportation, Joseph B. Eastman, but was added in the House Judiciary Committee following a colloquy between an expert witness and the Committee Chairman as to the desirability of placing the valuation function in the Commission. The witness had testified that the language of the bill as introduced might mean that "we would have to try the whole thing over again in the court." Hearings on H. R. 6249 before the House Com. on the Judiciary, 74th Cong., 1st Sess., pp. 249-50 (1935).

Commission, in patent disregard of the repeated holdings of this Court,* requires the exercise of this Court's jurisdiction to avoid impairment of the administrative role in reorganization proceedings. Moreover, the Reorganization Court decision would require Penn Central to pay a price for a bankrupt and deficit-operation railroad far in excess of any price which could reasonably and realistically have been anticipated from an actual liquidation of the New Haven properties. The exercise of this Court's jurisdiction is, therefore, also required to prevent a result which would be inconsistent with the requirements of the Interstate Commerce and Bankruptcy Acts that the terms for inclusion and sale be fair and equitable and consistent with the public interest.

The four issues enumerated above, which we seek to raise by this cross-petition, constitute the area of *disagreement* between the Reorganization Court and the Three-Judge Court. The area of *agreement* between the two courts encompasses all of the following issues sought to be raised by the New Haven bondholders in their petitions for certiorari and jurisdictional statements:

(1) The Commission's valuation of the Penn Central stock and the fairness of the underwriting formula designed to assure the opportunity for realizing the stock value as determined;

(2) The absence of value, for purposes of the bondholders' claims in liquidation, of the New Haven's right to use, without cost, Grand Central Terminal for the operation of its passenger trains;

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* See, *e.g.*, *Reconstruction Finance Corp.* v. *Denver & R. G. W. R. R.*, 328 U.S. 495, 508-509 (1946); *Ecker* v. *Western Pac. R. R.*, 318 U.S. 448, 472-73, 500 (1943).

(3) The fairness of the Commission's formula for imposition upon Penn Central of the New Haven losses incurred prior to the take-over of the New Haven by Penn Central;

(4) The absence of "going concern value" in the New Haven for purposes of the bondholders' claims in liquidation;

(5) The substantial evidence supporting the Commission's finding of a $3 million decline in liquidation value attributable to depreciation or erosion of asset values after the appraisals; and

(6) The Commission's valuation, based upon evidence of the New Haven Trustees, of certain New Haven investments.

We have not filed briefs in opposition to the granting of the bondholders' petitions for certiorari before judgment in the Court of Appeals with respect to the foregoing areas of agreement between the two courts since they are among the issues pending in the bondholders' appeals from the Three-Judge Court. If it were not for the circumstance of these insubstantial issues being part of the broader appeals by the bondholders, we would oppose the bondholders' petitions for certiorari.

Conclusion

For the reasons stated, this cross-petition for a writ of certiorari should be granted if the bondholders' petitions in Nos. 914, 916 and 920 are granted.

Respectfully submitted,

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